

Decision 05-04-040 April 21, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for a Permit to Construct Electrical Facilities With Voltages Between 50 kV and 200 kV: Viejo System Project.

Application 03-03-043
(Filed March 21, 2003)

**ORDER DENYING REQUEST FOR STAY AND
TEMPORARY RESTRAINING ORDER**

I. Summary

This order denies the Request for Stay and Temporary Restraining Order (Request) by N.O.P.E., Inc. (NOPE) filed in this proceeding on September 9, 2004. NOPE's request seeks an order from the Commission that would require Southern California Edison Company (SCE) to cease construction of its Viejo System Project (Viejo), a transmission upgrade project authorized by the Commission in Decision (D.) 04-07-027. We herein find that NOPE has not met its burden to demonstrate any of several elements required for our issuance of a stay or TRO. Because we do not find a TRO to be appropriate in this case, the issue of whether to stay the underlying order is moot.

II. Authority to Order Injunctive Relief

The Commission's authority to provide injunctive relief is firmly rooted in the California Constitution, the Pub. Util. Code, and case law.

"The Commission is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers. The California Constitution, Article XII, Sections 1-6,

grants the Commission plenary power over the regulation of public utilities. The Commission has broad authority to regulate public utilities, including the power to fix rates, hold hearings, and establish its own rules and procedures...¹ (T)he California Supreme Court recognized that the Commission has equitable jurisdiction, which permits it to issue injunctions: ‘The commission often exercises equitable jurisdiction as an incident to its express duties and authority. For example, the Commission may issue injunctions in aid of jurisdiction specifically conferred upon it. [citation omitted.]’ (See *Southern California Edison Company et al.*, Decision (D.) 01-07-033, 2001 Cal. PUC LEXIS 877**11-12.)

An individual assigned Commissioner or Administrative Law Judge (ALJ) may issue a temporary restraining order or preliminary injunction in order to preserve the status quo, subject to its ratification or reversal by the full Commission. (See the California Constitution, Article XII, Section 2, see also Pub. Util. Code § 310; *Systems Analysis and Integration, Inc. dba Systems Integrated v. Southern California Edison Company*, D.96-12-023, 69 CPUC2d 516, 522.)

The Commission has the authority to order a utility to refrain from doing something that violates the law, *i.e.*, to maintain the status quo after discovery of a likely violation. Because the Commission generally holds meetings twice a month, the Assigned Commissioner or ALJ may grant emergency relief until the full Commission can determine whether to impose a more permanent restraint.

In this case, no ruling has been issued and need not be issued because, consistent with our findings here, we are not convinced that emergency relief is

¹ Citing *Consumers’ Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905; *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, rehearing denied, review denied.)

required to promote justice or otherwise protect the public. We therefore proceed to deny NOPE's request with an explanation of our action as follows.

III. Standard of Review

The Commission uses the same test for temporary restraining orders that it uses for preliminary injunctions. (*See Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC 2d 244, 259; see also *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 84 CPUC2d 155, 169.) To obtain a temporary restraining order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.

Although consideration of the likelihood of complainants' ultimate success on the merits is not a final adjudication of the parties' ultimate rights, it does affect the balancing of the respective hardships between complainants and defendant. For example, the more likely it is that complainants will prevail, the less severe must be the alleged harm if injunctive relief does not issue. (*See King v. Meese* (1987) 43 Cal.3d 1217, 1227; see also *Los Angeles Memorial Coliseum Com'n v. Nat. Football* (9th Cir. 1980) 634 F.2d 1197, 1201 and 1203). We will apply these standards in evaluating this motion.

IV. Background

SCE filed this application for authority to construct certain transmission facilities in and around the community of Mission Viejo. The project, called the Viejo System Project, was designed to improve regional reliability. Because it transected recreational and residential neighborhoods of Mission Viejo, many members of the local community opposed the project and many advocated for

undergrounding of the lines. NOPE represented local residents who opposed the project as proposed, primarily because of the overhead lines.

Following the issuance of a mitigated negative declaration required by the California Environmental Quality Act, the Commission approved the project with some conditions in D.04-07-027.

On August 17, 2004, NOPE tendered an untimely application for rehearing of the order. The Commission's Docket Office rejected the tendered application on the basis that it was untimely. NOPE then filed separate Request for Leave to File an Application for Rehearing and for Stay and Temporary Restraining Order (TRO) on September 9, 2004. The Commission denied the request for leave to file application for rehearing in D.05-01-060. That order also provides a detailed discussion of the procedural history of this proceeding.

V. Discussion

In its September 9, 2004, Request for Stay and TRO, NOPE makes several related allegations. NOPE alleges that SCE failed to comply with Ordering Paragraph 9, which requires it to submit a written notice with the Commission, served on all parties to this proceeding, of its agreement to the conditions of D.04-07-027. NOPE also alleges that SCE failed to comply with Ordering Paragraph 7, which requires SCE to enter into a cost reimbursement agreement with the Commission for recovery of mitigation monitoring expenses. NOPE states that in spite of its failure to comply with these ordering paragraphs, SCE commenced construction of the project.

SCE replies that Ordering Paragraph 9 required it to file a notice of its agreement to accept all conditions contained in D.04-07-027 within 75 days of the effective date of the decision. SCE states it filed that notice and served it on all parties on September 16, 2004, before the end of the 75-day period. It asserts that

Ordering Paragraph 9 does not prohibit SCE from commencing construction before the notice is filed.

SCE also states it complied with Ordering Paragraph 7 when it entered into a cost reimbursement agreement with the Commission in early July. The Commission issued SCE a Notice to Proceed on July 15, 2004. SCE states it commenced construction on July 19, 2004.

According to Commission staff monitoring the Viejo System Project, SCE's recitation of the facts in this case is correct. SCE did not commence construction prior to the issuance of a Notice to Proceed on July 15, 2004. It filed a notice of agreement to accept the conditions of D.04-07-027 on September 16, 2004. SCE is correct that Ordering Paragraph 9 does not restrict it from commencing construction as long as SCE complies with all other conditions and ordering paragraphs. NOPE presents no evidence that SCE has failed to comply with any ordering paragraph or condition.

NOPE does not demonstrate that it has fulfilled any of the prerequisites for a TRO or stay. It does not provide any convincing evidence that it would likely prevail on the merits of its complaint. Indeed, we cannot even infer a cause of action from NOPE's pleading in light of the facts confirmed by Commission staff. Similarly, NOPE does not demonstrate that the public, NOPE or NOPE's constituency will suffer irreparable injury without a stay and TRO. In fact, it does not even argue that any person or organization would suffer irreparable injury absent a stay in this case.

The Commission has issued an order denying NOPE's request to file the out-of-time application for rehearing. The reasons NOPE provided in its request for stay and TRO are now moot due to subsequent actions by SCE. Thus we see no grounds for suspending the order granting SCE authority to construct its

project. To the contrary, the evidence from this proceeding suggests the community of Mission Viejo and its environs require the construction of the project to assure local reliability in the immediate future.

For the foregoing reasons, we deny NOPE'S request for stay and a temporary restraining order.

VI. Comment on Draft Decision

This draft decision addresses a request for temporary injunctive relief. Therefore, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

VII. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Kim Malcolm is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SCE timely satisfied the requirements of Ordering Paragraph 7 and Ordering Paragraph 9 of D.04-07-027.
2. NOPE presents no evidence to suggest that SCE is out of compliance with the conditions of the mitigated negative declaration adopted in D.04-07-027.

Conclusions of Law

1. Ordering Paragraph 9 of D.04-07-027 does not restrict SCE from commencing construction of the approved project prior to filing the notice of acceptance of conditions.
2. NOPE has not sustained its burden to demonstrate irreparable harm would occur absent our issuance of a TRO and stay nor has it provided evidence to suggest it would prevail on the merits.

O R D E R

IT IS ORDERED that:

1. The Request for Stay and Temporary Restraining Order by Intervenor N.O.P.E., INC. dated September 9, 2004 is denied as set forth herein.
2. Application 03-03-043 is closed.

This order is effective today.

Dated April 21, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners